

FILED

JUN 02 2014

  
Clerk

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

\*\*\*\*\*

DAVID D. LARVIE, JR. \* CIV 14-3006

Petitioner, \*

-vs-

\* ORDER DENYING  
CERTIFICATE OF APPEALABILITY

UNITED STATES OF AMERICA, \*

Respondent. \*

\*\*\*\*\*  
TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

This Court dismissed petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Petitioner contended that he was entitled to relief under the United States Supreme Court's decision in Descamps v. United States, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2276 (2013). I denied the motion as untimely because Descamps has not been found by the Supreme Court to be retroactively applicable to cases on collateral review. I further found that, even if timely filed, Descamps does not provide any relief to petitioner.

Pursuant to 28 U.S.C. § 2253, a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right.

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. This construction gives meaning to Congress' requirement that a prisoner demonstrate substantial underlying constitutional claims and is in conformity with the meaning of the "substantial showing" standard . . . Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the

petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000) (emphasis supplied). Petitioner did not and has not made a substantial showing that jurists of reason would find it debatable whether this matter was correctly dismissed.

IT IS HEREBY CERTIFIED that there does not exist probable cause of an appealable issue with respect to the Court's order denying petitioner's motion to vacate, set aside, or correct sentence. Petitioner's application for a certificate of appealability is denied. This in no way hampers the petitioner's ability to request issuance of the certificate by a circuit judge pursuant to Fed. R. App. P. 22.

Dated this 31<sup>st</sup> day of May, 2014.

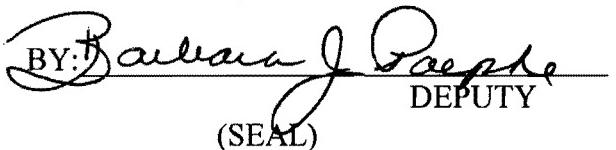
BY THE COURT:



CHARLES B. KORNMANN  
United States District Judge

ATTEST:

JOSEPH HAAS, Clerk



BY: Barbara J. Daegle  
DEPUTY  
(SEAL)